NO. 21,743

In the United States Court of Appeals
for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

LOCAL UNION NO. 38, UNITED ASSOCIATION OF JOURNEYMEN AND APPRENTICES OF THE PLUMBING AND PIPE FITTING INDUSTRY OF THE UNITED STATES AND CANADA, AFL-CIO, RESPONDENT

On Petition for Enforcement of an Order of the
National Labor Relations Board

REPLY BRIEF ON BEHALF OF INTERVENOR

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I N D E X

AUTHORITIES CITED

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Miscellaneous:

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PRELIMINARY STATEMENT

The Intervenor in this case is Phillip Havill, an individual, who was the Charging Party before the National Labor Relations Board. This Brief is filed pursuant to Motion for Intervention granted by this Court on June 1, 1967 and pursuant to Stipulation approved by this Court on July 25, 1967, and pursuant to extension of time granted by this Court on September 5, 1967.

STATEMENT OF THE CASE

Intervenor accepts and agrees with the statement of the ts set forth in the Board's Brief, and disagrees with the supplemental remarks and comments set forth in Respondent's Brief.

Intervenor also agrees with the arguments set forth in he Board's Brief. Hence, Intervenor does not consider it necesary to reply to the Board's Brief but rather to Respondent's rief, and in so doing will, perhaps, supplement the Board's rief.

ARGUMENT IN REPLY TO RESPONDENT'S BRIEF

I. Respondent accepts virtually all of the Findings of act made by the Trial Examiner and by the Board:

Respondent, at the outset of its Brief, makes the following explicit concessions:

> "The Statement of the case contained in the Board's Brief, (is) accurate enough as far as it goes * * *.
>
> "The Board made certain Findings of Fact * * * While Respondent does not agree with all those Findings, it concedes that they are supported by substantial evidence within the meaning of applicable criteria limiting the scope of judicial review." (Brief for Respondent, page 1, emphasis added.)

Thus, the factual findings made by the Board (which firmed those made by the Trial Examiner) are not in issue and ut be sustained.

In addition, the "supplementary" facts referred to in Respondent's Brief are not properly before this Court. Although the Board, in its petition for enforcement, filed the entire transcript and record in this Court, it also filed a separate "Designation of Record" (dated May 4, 1967, and filed with this Court on or about the same date) in support of the "Statement of Points on which Petitioner intends to Rely" (also filed at the same time). Such designation was filed pursuant to Rule 34(7)(b) of this Court. Said rule also explicitly requires a respondent to serve and file within ten days after receipt of petitioner's designation "a designation of additional portions of the record desired * * *."

In the instant proceeding, the Board's Designation of Record (which is accepted by the Intervenor) identifies all portions of the transcript of hearing before the Trial Examiner which contains testimonial and evidentiary matter in support of the Trial Examiner's Findings of Fact and in support of the Board's Findings and Conclusions.

On the other hand, Respondent has not filed any counter or supplementary designation of the transcript or of evidentiary material upon which it seeks to rely.

While it may be said that literal and arbitrary adherence to technical rules may impede the ultimate cause of justice, Justice without rules is only a concept incapable of administration or application. Intervenor wishes this case to be decided on its merits but respectfully urges that the proper way to achieve such result is by compliance with the rules of this Court.

Thus, Respondent's supplemental statement of facts and eliance upon undesignated evidence is out of order.

II. Respondent's implied attack upon credibility indings of Trial Examiner and Board are without merit as a mat-er of law and without foundation in fact:

Respondent argues in its Brief that it demanded the ischarge of Intervenor, Phillip Havill, for reasons other than is lack of membership in Respondent Union. Respondent attempts o argue, while perhaps not explicitly, that the self serving estimony of Union business manager Mazzola and Union business epresentative Costello ought not to have been rejected and hould have been credited over the testimony of Havill and ompany president Chadbourne. (See Respondent's Brief, pages -3.)

In reply to this argument, or arguments, the Court's ttention is directed to the following significant points:

1. Respondent, by its letter dated September 22, 1964, o D. I. Chadbourne, Inc., the employer, demanded the discharge f Intervenor, explicitly stating:

> "You state that you have employed Mr. Phil Havill, a Non-Union man, as a steamfitter. * * * I ask that you immediately correct this situation and get rid of all Non-Union men in your employ." (R. 17; G.C. Exh. 3).

2. Moreover, the Trial Examiner specifically found, as atter of fact, that Respondent caused Havill's discharge ecause of his non-membership in Respondent Union. The Board firmed such finding of fact.

derive knowledge from Costello that Havill was not affiliated with the Respondent's parent organization, but also Costello's inquiry of Havill concerning the 'locals' out of which he had worked and Havill's response, plainly reveal Costello's awareness of Havill's 'non-union status.' " (R.16 ; Trial Examiner's Decision, page 4, Footnote 9.)

III. Respondent's contention that the Board erred in nferring an illegal motive when it might have inferred a legal otive is invalid as a matter of law:

The overwhelming and clear-cut weight of judicial uthority is precisely to the contrary. See NLRB v. Walton anufacturing Company, 369 U.S. 404, 82 S. Ct. 853, 7 L. ed. d 329, 49 LRRM 2962 (April 9, 1962).

In Walton, the United States Supreme Court reaffirmed he rule it had set forth many years ago in Universal Camera oporation v. NLRB, 340 U.S. 474, 27 LRRM 2373, that the eviewing court may not displace the Board's choice between two airly conflicting views, even though the Court would justifiably ave made a different choice had the matter been before it e novo.

See also the decision of this Court in Bon Hennings ogging Company v. NLRB, (C.A. 9), 308 F. 2d 548, 51 LRRM 2085 September 4, 1962).

In the Bon Hennings case, this Court rejected exactly he same contentions made by the employer in that case as are eing made by the Respondent Union in the instant case.

Thus, what is sauce for the goose must be sauce for he gander.

IV. Respondent's argument based upon its interpretaion of the "48 hour" rule in the hiring hall clause of its ollective bargaining agreement is fallacious and absurd:

Respondent's argument is set forth on pages 4-6 of its rief to this Court.

Article II, Section 7 of the collective bargaining greement (G.C. Exh. 7) expressly provides as follows:

> "If the Union is unable to furnish qualified workmen within 48 hours after an Employer calls for them, the Employer shall be free to procure the workmen from any other source or sources."

Succinctly stated, Respondent's argument boils down to ts unilateral "interpretation" that the 48 hour period starts o run anew each time an employer rejects an applicant dis-atched by the Union and that an employer must exhaust the nion's "out-of-work" list before he can hire an employee from ny other source, or at least must exhaust the Union's list of pplicants which the Union unilaterally considers qualified, egardless of the length of time such procedure might take, hether 48 hours, 480 hours, or 4800 hours.

It hardly needs to be demonstrated that acceptance of espondent's theory, ingenious as it may be, would be to nullify hs particular contract provision. The "48 hour rule" is clear nd unambiguous on its face, and its legality is not in question.

Respondent virtually admits the weakness of its own rgument by its detailed explanation of how the 48 hour rule is supposed to work" in Respondent's opinion. Thus, on page 5 of ts Brief to this Court, Respondent states:

> "If the contractor rejects the second, and perhaps the third, man as well, it is obvious that 48 hours will have elapsed long before the 10 presumptively qualified men have all been dispatched." (emphasis added)

As pointed out by the Board in its Brief, Respondent aintained at the hearing before the Trial Examiner that Havill's qualifications to perform the work in dispute are not at issue er." (Tr. 102); and the record is clear that Havill was ualified (Tr. 102-105).

Moreover, the Trial Examiner's Decision affirmed by he Board, specifically points out the following significant ac:

> "There is more than a faint suggestion in the record that Costello had actually exhausted the out-of-work list when on August 26 he dispatched Harold Stone whom Chadbourne found was not suitable for boiler work. Costello testified that at the time of Stone's referral there were probably 55 to 60 men on the list; that he 'proceeded to call down the list, explaining first the nature and type of job and proceeded to exhaust the list until -- (he) could acquire

someone who would take this job referral'; and that such person was Stone who 'was the only man that would take the job.'" (R. 21; Trial Examiner's Decision, page 9, Footnote 18)

In this connection, see also letter dated September , 964 from D. I. Chadbourne, Inc., to Respondent explaining hehiring of Havill, in accordance with the Union contract, ftr waiting not only 48 hours but for more than a week, and ryng out three or four applicants dispatched by the Union who ro'ed to be unqualified for the job involved. (G.C. Exh. 2). ot also letter dated October 28, 1964 from D. I. Chadbourne, nc, to Respondent, reluctantly complying with Respondent's em.nd for the discharge of Havill, and stating, in part, as ol.ows:

"Mr. Havill was hired only after the Union was unable to supply a qualified man. When he went to the Union, he was told he could not join. * * *.

"I am sorry that you feel it necessary to force me to lose a qualified employee. I am doing so only to avoid trouble, not because it's right." (G.C. Exh. 6)

With the utmost respect for the able counsel for Respondent, certainly nothing more is involved in this "defense" than a tongue in cheek effort by a great lawyer to try to make some colorable defense for his client in an impossible case.

V. Respondent's argument that there is an issue involving the grievance-arbitration provision of the Union contract is not supported by the evidence and is contrary to the evidence:

Although Respondent in its Brief does not specifically cite the applicable contract section, Article II, Section 10 of the contract provides for a grievance-arbitration procedure for determining disputes involving the operation or application of the Union hiring hall. (G.C. Exh. 7). Respondent's argument is confronted by the following statement:

> "Whether or not Respondent's interpretation of the agreement is correct, it is certainly reasonable and arguable." (Brief for Respondent, page 6).

Such statement, of course, in and of itself betrays the glaring weakness in Respondent's position as demonstrated in detail above.

Respondent then contends that the Board had no jurisdiction to issue its decision and order in the instant case "in the face of an arbitration clause." (Brief for Respondent, page 5).

Without belaboring this point, and without labeling it a 'red herring," it is crystal clear from the record that the Union never submitted this alleged issue of contract interpretation or contract violation to the contractual grievance-arbitration procedure. In fact, assuming it could have done so, the very fact that it never did so demonstrates the fallacy (if no deceptiveness) of Respondent's argument.

As specifically found by the Trial Examiner and the oard: "There is no evidence that the Union itself ever sub-itted the propriety of its demand for Havill's discharge to ns Committee." (R. 19; Trial Examiner's Decision, page 7, otnote 14).

Thus, Respondent's "argument" is simply not applicable o the facts of this case.

Moreover, it must be remembered that Respondent origi-ally and unequivocally demanded Havill's discharge by letter ated September 22, 1964 to D. I. Chadbourne, Inc., saying in o many words "get rid of all Non-Union men in your employ," and dentifying Havill by name as "a Non-Union man." (G.C. Exh. 3).

For the Union now to argue that it later changed its ind and demanded Havill's discharge only because of some claimed, u never prosecuted nor ever presented, violation of its uni-aeral interpretation of the contract hiring hall clause can adly be done with a straight face, much less taken seriously by hs Court.

Thousands of cases attest to the fact that employers ae been found guilty of discharging employees for union member-hp or activity, and their pleas of innocence, based upon law-u economic motivation or reasonable contract interpretation reverberate in vain throughout volumes of NLRB reports and Court decisions. Surely, Mr. Havill, the Intervenor, can rely upon ths Court to see through the same pretext and subterfuge on the part of Respondent Union in a case where the shoe is on the other foot, but where the identical principles of law apply.

VI. Respondent's argument based upon its alleged good ith is unmeritorious and invalid as a matter of law:

Respondent, in its closing argument, seeks to justify t unlawful conduct by asserting its "good faith insistence by nion upon its interpretation of a collective bargaining agree- nt, in the context of an offer to submit the issue to the con- ractual grievance procedure." (Brief for Respondent, page 7).

First of all, as demonstrated above, Respondent never fered to submit this (or any other) issue to the contractual evance procedure.

Secondly, the defense of good faith is obviously mis- laced. The absence of good faith is not a legal element in a idation of Section 8(b)(2) of the Act. This is not a case nolving Section 8(a)(5) or Section 8(b)(3) where good faith is n essential element because the violation involved in those ctions are a "refusal to bargain in good faith."

The United States Supreme Court in NLRB v. Burnup and ns, Inc., 379 U.S. 21, 57 LRRM 2385 (1964) squarely held that od faith was no defense to an employers discharge of an mployee. Again, what is sauce for the goose must be sauce for h gander.

CONCLUSION

Finally, reference is respectfully made to an article y Judge Henry Friendly in his continuing struggle to improve the dinistration of justice after leaving the bench of the United ttes Court of Appeals for the Second Circuit. The article, nitled "Satisfaction, Yes - Complacency, No!," appears in the

August, 1965 issue of the American Bar Association Journal and is based upon a speech delivered on May 21, 1965 at the annual dinner of the American Law Institute.

In that article, Judge Friendly asks the following question:

> "Is it really sensible that if Jim Smith loses his job for a couple of months through a discriminatory discharge, he should have to wait several years for the few hundred dollars he needs now - even if it is the public treasury that spends the many thousands of dollars required under existing procedures to procure that trifling sum for him?"

Indeed, the maxim "Justice delayed is Justice denied" is complex. But, the instant case dramatizes and emphasizes Judge Friendly's illustration in a much stronger and much more tangible manner. Intervenor, Phil Havill, lost his job as a result of the unlawful conduct of Respondent Union in October, 1964. Mr. Havill promptly filed the original unfair labor practice charge in this matter approximately one or two days later. It is now almost three years later, and the issue has still not been resolved.

Moreover, this case does not involve a "few hundred dollars." According to a computation submitted on behalf of the Intervenor to the Regional Office of the NLRB in the summer of 1966, the total back pay due was almost $16,000.00 as of the end of July, 1966. Upon further and detailed investigation by the

eional Office, the back pay was computed to be over $13,000.00
n Respondent was so notified on October 14, 1966.

This case was referred by the Regional Office to the
ord in Washington in December, 1966 for enforcement upon noti-
iation from Respondent Union that it refused to pay more than
ew hundred dollars in back pay.

It is the belief and conviction of the undersigned
onsel for Intervenor that if the Board's decision and order is
norced by this Court, Respondent Union will then demand a back
a hearing which will involve another hearing before a trial
xminer, another appeal to the Board in Washington and another
norcement proceeding before this Court. It does not seem pre-
uptuous to suggest that this will involve another three years
fdelay. By that time, with interest, the total back pay due
a well be in the neighborhood of $20,000.00. This is a sub-
tntial sum which makes Judge Friendly's question all the more
mortant and urgent.

Moreover, this is not a case involving a non-union
mloyee. Intervenor, Phil Havill, was a member of the
lctrician's Union and other unions, and wanted to be a member
fthe Plumbers Union, but Respondent operates a "closed Union"
n was unwilling to admit Havill into membership, claiming that
thad too many members on the bench (i.e., out of work). Simi-
aly, the employer in this case was a union contractor, party to
ollective bargaining agreement, and trying to comply with the
ems and provisions of said agreement while at the same time
tempting to secure his rights guaranteed under said agreement.

Concededly, perhaps, the foregoing comments, by way fconclusion, are outside the technical boundaries of legal rument before this Honorable Court. Perhaps they involve hlosophy, legal or social. But the quest for Justice, whether nthe abstract or in the practical day to day affairs of life, anot be completely separated from Philosophy.

Whether this Court in this case can solve the bigger rblem, raised by Judge Friendly and many other erudite hnkers, is a difficult question in and of itself. Surely, hs Court will try and will issue a decision which it considers rper under all the circumstances.

If this Court feels that it can take a giant step for-ad in this case, history will record that the first real step a taken by the United States Court of Appeals for the Ninth icuit.

Respectfully submitted,

ROBERT J. SCOLNIK
Attorney for Intervenor

cober, 1967.

CERTIFICATE

The undersigned certifies that he had examined the pro-iions of Rules 18, 19 and 39 of this Court, and in his opinion h tendered brief conforms to all requirements.

ROBERT J. SCOLNIK, ESQ.